

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:09-cr-10243-MLW

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5

6 UNITED STATES OF AMERICA

7

8 vs.

9

10 RYAN HARRIS

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15 For Jury Trial Before:
Chief Judge Mark L. Wolf

16

17 United States District Court
District of Massachusetts (Boston.)
18 One Courthouse Way
Boston, Massachusetts 02210
19 Thursday, March 1, 2012

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E X H I B I T S

(None entered.)

1 P R O C E E D I N G S

2 (Begins, 9:00 a.m.)

3 THE CLERK: Criminal Matter 09-10243, the
4 United States of America versus Ryan Harris. The Court
5 is in session. You may be seated.

6 THE COURT: Would counsel please identify
7 themselves for the record.

8 MR. BOOKBINDER: Good morning, your Honor.
9 Adam Bookbinder for the United States.

10 MR. McGINTY: Your Honor, Charles McGinty and
11 Christine Demaso for Mr. Harris. Good morning.

12 THE COURT: All right.

13 We're missing one juror and the alternate. Um, we
14 can start without the alternate, but we'll wait for the
15 last deliberating juror.

16 There are two matters that I wanted to raise with
17 you, however. One is the exhibits.

18 Are the paper exhibits, have they been reviewed by
19 the parties and agreed to?

20 MR. BOOKBINDER: Your Honor, we've reviewed
21 all the paper exhibits. Those are agreed to. We've
22 also reviewed the electronic juror's copy of the
23 exhibits and we've agreed to those as well.

24 THE COURT: Is that correct, Mr. McGinty?

25 MR. McGINTY: That's right, your Honor.

1 THE COURT: All right. Somebody needs to
2 explain to me, maybe Mr. Niecewicz, who is here, how
3 this works. I understand there's no disk that the
4 jurors receive and can be -- that can be marked for the
5 record.

6 THE CLERK: (Mr. Niecewicz.) Chief, um, once
7 we release the exhibits back to the jury room, they'll
8 be instructed to watch a brief tutorial and then they'll
9 just basically hit the exhibit list button and it will
10 bring up all the exhibits for them to open and they can
11 go back to them. Um, they can't look at them now until
12 everybody gets here and Dan releases them.

13 THE COURT: Okay. And, you know, it's
14 something to consider.

15 Is there any permanent record of what goes on the
16 system?

17 THE CLERK: (Mr. Niecewicz.) We'll burn a
18 disk of what has been saved to this particular case and
19 keep a record of it.

20 THE COURT: Well, I want the disk and I want
21 the disk to be given a letter because theoretically
22 there could be a discrepancy between what was admitted
23 and what's on the disk. So I think there has to be a
24 record of what's on the disk. Okay?

25 THE CLERK: (Mr. Niecewicz.) Okay.

1 THE COURT: We'll get that DVD as soon as
2 possible.

3 And is there any objection to having somebody from
4 the court IT staff just go in and show them where the
5 tutorial button is?

6 MR. BOOKBINDER: No, your Honor.

7 MR. McGINTY: No, your Honor.

8 THE COURT: Okay, then we'll do that.

9 Then what's the next letter?

10 THE CLERK: J, Judge.

11 THE COURT: Okay. We'll mark as Exhibit J an
12 article from today's Boston Globe named "Hacker Trial,
13 Issues of Theft and Free Access," um, and give you
14 copies.

15 Have you read this article?

16 MR. McGINTY: I have not.

17 MR. BOOKBINDER: Yes.

18 THE COURT: Okay.

19 (Hands out copies.)

20 THE COURT: The question is going to be
21 whether -- I mean, I've admonished them not to read the
22 media and there's nothing in here that I saw about
23 excluded evidence or the discussion yesterday about the
24 sufficiency of the evidence that was addressed by the
25 stipulation. I guess I'm not inclined to ask whether

1 anybody read it, but I thought I should discuss that
2 with you.

3 Let Mr. McGinty go through it.

4 (Reads.)

5 MR. McGINTY: Thank you, your Honor.

6 THE COURT: All right. What are the parties's
7 thoughts on whether I ought to ask whether anybody's
8 read, seen or heard anything in the media?

9 MR. BOOKBINDER: Your Honor, I think, like the
10 Court, I'm generally not inclined to suggest inquiring
11 into what goes one with the jurors. I would defer to
12 the Court's experience on this, but I think it makes
13 sense probably to repeat the admonition but not to do a
14 specific inquiry.

15 MR. McGINTY: I think that's sensible.

16 THE COURT: Okay. I think we're all in the
17 same place. I mean, sometimes when the media's, you
18 know, reporting on matters that occurred in court
19 outside the presence of the jury, prominently,
20 repeatedly, um, I will ask, but as I read this, there
21 was no reference to excluded evidence or the sufficiency
22 of the evidence. There are comments by, you know,
23 people about the prosecution, I think it can be stated
24 that way, and I have directed them. But, you know,
25 they're to follow the instructions and return a verdict

1 based on the evidence and the law regardless of whether
2 they understand the law or agree with it. So I just
3 thought I should consult you.

4 All right. Well, we'll recess. I'm scheduled on
5 an international telephone call at 9:30, but if we get
6 the 12th juror, I'll interrupt that and come back just
7 to make sure they're all here, and then send them back
8 to deliberate.

9 (Pause.)

10 THE COURT: So we'll get them their lunch at
11 12:30, if they haven't finished their deliberations by
12 then.

13 All right. The Court is in recess.

14 (Recess, 9:30 a.m.)

15 (Resumed, 9:45 a.m.)

16 THE COURT: All right. All the jurors are
17 here except the alternate and we can start without him.
18 So we'll get the jury.

19 (Pause.)

20 THE COURT: And, Mr. Niecewicz, were you able
21 to go back and show them the tutorial?

22 THE CLERK: (Mr. Niecewicz.) Yes, your Honor.

23 THE COURT: Of course you can't discuss
24 anything with them.

25 THE CLERK: (Mr. Niecewicz.) Yes, your Honor.

1 (Pause.)

2 THE COURT: Is it true they wanted a hot
3 lunch?

4 (Laughter.)

5 MR. McGINTY: I would, too.

6 THE COURT: I have another message from the
7 jury.

8 "The jury would like to know if we could have a
9 hot lunch today from the cafeteria such as hamburgers,
10 fries or pizza, plus cookies, brownies, plus tossed
11 garden salad as well, plus all jurors are here and
12 accounted for."

13 (Laughter.)

14 THE COURT: I don't know. I don't think so.
15 We'll check. We can ask.

16 All right. I think salad and pizza, we can
17 probably do that.

18 You know, 27 years, I haven't gotten that one
19 yet.

20 (Laughter.)

21 THE COURT: All right. I'm going to tell them
22 that we'll inquire and maybe I could get pizza. I don't
23 think I can order hamburgers. But go ahead.

24 (Jury enters, 9:30 a.m.)

25 (Another note from jury.)

1 THE COURT: "A juror would like to see and
2 hear instructions pertaining to the wire fraud in this
3 case, both definition and counts," as predicted.

4 (Pause.)

5 THE COURT: All right. So with regard to the
6 instruction, anticipating this possibility, I
7 essentially read them it verbatim, the wire fraud
8 instructions, and can tell them substantially the same
9 thing I told them yesterday. When they say they want to
10 see them, um, only part of the instructions were written
11 out and I would not feel comfortable just giving them,
12 to take back with them, the case-specific part. I can
13 ask the -- so I'm going to tell them there isn't a
14 transcript of the complete instruction and they'll just
15 have to listen and if they have any questions, just come
16 back to me, which is part of the reason I usually don't
17 send back a transcript, although I've considered it on
18 occasion.

19 Any comments on that response?

20 MR. McGINTY: No, your Honor.

21 MR. BOOKBINDER: No, your Honor.

22 THE COURT: Okay. Let's bring them in.

23 (Jurors enter, 9:30 a.m.)

24 THE COURT: Ladies and gentlemen, you've
25 braved the elements and got back. That's good. I have

1 two questions.

2 The first, Mr. Foreman, if I read it right, says:
3 "A juror would like to know if we could have a hot lunch
4 today from the cafeteria such as hamburgers, fries or
5 pizza, plus cookies, brownies, plus tossed garden salad
6 as well, plus all the jurors are here and accounted
7 for."

8 Is that indeed the first question?

9 THE FOREPERSON: Yes.

10 THE COURT: The answer is maybe. I'll look
11 into whether we can get you some pizza. There's a
12 protocol in the courthouse, they typically bring up
13 sandwiches and salad, as I understand it, for the
14 jurors, but I'll see what I can do. And you'll get
15 snacks around 10:30 if your deliberations -- and you'll
16 get lunch at 12:30. If you finish your deliberations
17 before 12:30, let us know and you can eat the lunch
18 anyway. A lot of verdicts I get right after lunch. So
19 you can have lunch anyway. But if you're still
20 deliberating, they'll bring the lunch about 12:30.
21 Okay?

22 Then am I correct that the second question for
23 this morning is that:

24 "The jury would like to see and hear instructions
25 pertaining to the wire fraud of this case both the

1 definition and counts."

2 Is that correct?

3 THE FOREPERSON: Yes.

4 THE COURT: All right. They haven't gotten
5 the indictments yet?

6 THE CLERK: No, judge.

7 THE COURT: All right.

8 I can give you again, as I said yesterday,
9 anticipating that you might ask this, the case-specific
10 instructions on wire fraud and I can read you again what
11 the indictment says, but when you go back, we're going
12 to give you that indictment. In fact, let me give it to
13 you right now. So, you know, you'll know what the
14 specific charges are. But here, actually, I prefer you
15 sit down first.

16 THE CLERK: Sorry, Judge.

17 THE COURT: So you'll have the indictment.

18 There is no transcript of everything I said to you
19 yesterday about the instructions and it's very
20 important, although I'm going to repeat the wire fraud
21 instructions, that you consider them in the context of
22 everything I said, um, much of it from an outline, not
23 from a text, so there's nothing I feel I can properly
24 give you to read.

25 In addition, if you have questions about the law,

1 I don't want you to be back there trying to figure out
2 what the instructions mean, I want you to write me a
3 note. So you can come in and if something needs
4 repetition or particularly a different explanation, a
5 fuller explanation, then I'll know and I'll talk to the
6 lawyers and see what I can tell you about it. Okay?

7 All right. So now Mr. Hohler will give you each a
8 copy of the indictment.

9 (Hands out.)

10 THE COURT: But why don't you just put that
11 down for a minute because there are some things that I'm
12 going to tell you again before we focus on the
13 indictment.

14 As I told you yesterday, there are now eight
15 charges of wire fraud for you to decide. You're not
16 being asked whether the government has proven the
17 original earlier Count 1, the conspiracy charge that was
18 read to you at the beginning of the trial, that charge
19 has been removed from the copy of the indictment you
20 have in the jury room and the charges have been
21 renumbered. So all of the charges now are wire fraud.
22 Okay? And don't read the indictment. We'll get to it.
23 We'll read it together.

24 Do you remember I told you yesterday that the
25 indictment is merely an accusation, it's not evidence or

1 proof that the defendant is guilty of any or all of the
2 wire frauds charged. Therefore, the government must
3 prove he's guilty beyond a reasonable doubt to achieve
4 his conviction on any charge. Each count alleges a
5 separate crime. You should consider each count
6 separately and return a separate verdict for each
7 count.

8 Unless I gave you a limiting instruction in the
9 course of the case, you may consider all of the evidence
10 in deciding each count, and if I gave you a limiting
11 instruction, you have to use the information only for
12 the limited purpose I directed. As to each separate
13 count, you must determine whether the government has
14 proved the defendant guilty beyond a reasonable doubt.

15 Evidence provided by or concerning other people
16 may be considered by you. However, the fact that
17 another person pled guilty to committing some other
18 crime is not itself evidence or proof that Harris is
19 guilty of any of the wire charges in this case. Your
20 verdict should be based solely upon the evidence or lack
21 of evidence concerning Mr. Harris, in accordance with my
22 instructions, and without regard to the guilty pleas of
23 others. Depending on your view of the evidence, you
24 could find Mr. Harris not guilty on all counts, guilty
25 on some counts and not guilty on other counts, or guilty

1 on all the counts. That's up to you.

2 You'll see that the indictment charges that
3 certain crimes were committed on or about a particular
4 date. It is not necessary for the government to prove
5 beyond a reasonable doubt that the crimes were committed
6 on a particular date. The government does have to prove
7 that the crimes were committed on a date reasonably near
8 the dates alleged in the indictment. But the government
9 doesn't have to prove the precise date.

10 Then, as I said, all of the remaining charges, all
11 of the remaining counts charge Mr. Harris with
12 committing wire fraud. And the charging language -- now
13 you can look at it, is in Paragraph 1. It says: "On or
14 about the dates set forth below, in the District of
15 Massachusetts and elsewhere, Ryan Harris, having
16 knowingly devised a scheme to defraud and to obtain
17 money and property by means of material false and
18 fraudulent pretenses, representations and promises,
19 transmitted and caused to be transmitted in interstate
20 commerce wire communications, including writings,
21 signals and sound, for the purpose of executing the
22 scheme to defraud and aided and abetted others in doing
23 so as set forth below."

24 And actually I'm not instructing you on aiding and
25 abetting. You're going to have to decide whether

1 Mr. Harris alone -- well, whether Mr. Harris committed
2 all of the -- well, not alone, but Mr. Harris committed
3 all of the elements of wire fraud as I'm going to
4 describe them to you.

5 And then each count alleges that a particular wire
6 was sent or caused to be sent by Mr. Harris in
7 furtherance of the alleged scheme. So Count 1 charges:
8 "In about 2005, NH," Nathan Hanshaw, "accessed the
9 internet from Massachusetts and downloaded Harris's
10 Sigma cable modem hacking product" in furtherance of the
11 alleged scheme in which it's charged Mr. Harris
12 participated in.

13 Count 2 charges that in or about 2007 Hanshaw
14 accessed the internet from Massachusetts and downloaded
15 Harris's Sigma X cable modem hacking product for the
16 purpose of executing a scheme to defraud.

17 And then it goes right down the line. If you
18 want, I'll read them all now, or perhaps it's not
19 necessary. But I can read them all to you.

20 Count 3 charges that on or about January 15, 2007,
21 in furtherance of the scheme, Hanshaw accessed the
22 internet from Massachusetts using Harris's products and
23 a cloned MAC address and participated in an on-line chat
24 discussing his hacking activities.

25 Count 4 charges that on or about December 5, 2007

1 Hanshaw accessed the internet from Massachusetts using
2 Harris's products and a cloned MAC address and
3 participated in an on-line chat discussing his hacking
4 activities.

5 Count 5 charges that on about June of 2008, in
6 furtherance of the scheme to defraud, Jose Larosa
7 accessed Harris's TCNISO website from Massachusetts and
8 bought a cable modem and ancillary products.

9 Count 6 charges that Larosa accessed the Internet
10 from Massachusetts using Harris's products and a cloned
11 MAC address and obtained free Internet access on about
12 July of 2008.

13 Count 7 charges that William Madeira, on about
14 June -- or in about June of 2009 accessed Harris's
15 TCNISO website for Massachusetts and bought a modified
16 cable modem and ancillary products.

17 And Count 8 charges that Madeira accessed the
18 internet from Massachusetts on about July of 2009, in
19 furtherance of the scheme, using Harris's products and a
20 cloned MAC address and obtained free internet service.

21 So those are the charges. Now I'm going to tell
22 you again what the government has to prove beyond a
23 reasonable doubt to prove wire fraud, each charge of
24 wire fraud.

25 The government has to prove the following things

1 beyond a reasonable doubt. First, that there was a
2 scheme substantially as charged in the indictment to
3 defraud or obtain something of value from an internet
4 service provider or internet service providers by means
5 of false or fraudulent pretext. Second, that the
6 defendant knowingly and willfully participated in the
7 scheme with an intent to defraud. Third, on or about
8 the dates alleged, the defendant transmitted or caused
9 to be transmitted an interstate wire communication for
10 the purpose of furthering the scheme.

11 If the government fails to prove any of these
12 elements beyond a reasonable doubt, you must find the
13 defendant not guilty on the counts you are considering.
14 If the government proves all of these elements beyond a
15 reasonable doubt, with regard to a particular count, you
16 must find him guilty of that charge.

17 The first thing that the government must prove
18 beyond a reasonable doubt is that the defendant
19 participated in a scheme to defraud that involved
20 material false or fraudulent pretenses. A scheme is a
21 plan or a course of conduct. The term "to defraud"
22 means to deceive someone of something of value by means
23 of deception or cheating. A scheme to defraud
24 ordinarily includes a desire to bring about some gain or
25 benefit for oneself, or some other person, or desire to

1 cause loss to someone else. The term "false or
2 fraudulent pretenses" means any intentional material
3 false representation or omission including material
4 direct false representations and the deliberate
5 concealment of material facts. A fact is material if it
6 has a natural tendency to influence or is capable of
7 influencing whoever or whatever is making a particular
8 decision.

9 In essence, in this case the government must,
10 among other things, prove beyond a reasonable doubt the
11 existence of a scheme to deprive internet service
12 providers of payment for internet service based on
13 intentional material false representations or omissions
14 relating to a particular device concerning whether that
15 device was authorized to receive such internet service.
16 While the government must prove that the scheme alleged
17 in the indictment existed, it does not have to prove
18 that it succeeded.

19 The next thing the government must prove beyond a
20 reasonable doubt is that the defendant participated in
21 the alleged scheme knowingly and willfully and with the
22 intent to defraud. The government does not have to
23 prove that the defendant originated the alleged scheme,
24 it only has to prove that he participated in it with the
25 required knowledge and intent to defraud. To act

1 knowingly means to act intentionally, not by accident or
2 mistake. To act willfully means to intentionally do
3 something known to be unlawful. An intent to defraud
4 means to act knowingly and with specific intent to
5 deceive for the purpose of causing some financial loss
6 or to obtain money for the defendant or someone else or
7 for both of these purposes.

8 It would not be enough to prove wire fraud for the
9 government to prove only that Harris sold one or more
10 products that he knew would be used to commit a crime.
11 However, the nature of the products sold and any
12 knowledge Harris has as to how it would be used are
13 evidence that you could consider, along with all the
14 other evidence, in deciding whether the government has
15 proven any or all of the wire fraud charges in this
16 case.

17 Intent or knowledge need not be proven by direct
18 evidence, therefore circumstantial evidence as well as
19 direct evidence may be important to determining the
20 defendant's state of mind. In determining what the
21 defendant knew or intended at a particular time you may
22 consider any statements made or anything done or not
23 done by the defendant and all other facts and
24 circumstances proven by the evidence. You may infer,
25 but you are certainly not required to infer, that a

1 person intends the natural and probable consequences of
2 acts knowingly done or deliberately not done. It's
3 entirely up to you, however, to decide what facts are
4 proven by the direct and circumstantial evidence.

5 The last thing that the government must prove
6 beyond a reasonable doubt is that on or about the date
7 alleged in the indictment, for the count that you are
8 considering, the defendant transmitted or caused to be
9 transmitted an interstate wire communication in
10 furtherance of the alleged scheme. The use of the
11 internet to send a message, such as an e-mail or a
12 communication to a website, may be a wire
13 communication. An interstate wire communication is a
14 wire communication from one state to another. The wire
15 communication does not have to be essential to the
16 scheme or be itself fraudulent, however it must be made
17 as part of an attempt to execute the scheme or
18 accomplish one of its goals.

19 To prove that the defendant caused a particular
20 interstate wire communication to occur, the government
21 does not have to prove that he sent the wire
22 communication himself. It would be sufficient if the
23 government proves beyond a reasonable doubt that he knew
24 that the use of interstate wires would follow in the
25 course of the scheme or that it was reasonably

1 foreseeable that the interstate wires would be used as a
2 result of his actions. It is the use of interstate
3 wires generally rather than the specific wire
4 transmission that is charged that must be proved to have
5 been reasonably foreseeable as a result of the scheme.

6 Therefore, if it is proven that Harris
7 participated in the alleged scheme or did something
8 relating to it which he knew or should have reasonably
9 foreseen would result in interstate wire transmissions
10 being used in an effort to execute that scheme or to
11 accomplish its goals, you may find the use of interstate
12 wire communications element to be proven.

13 As I said earlier, if you find the government has
14 proven beyond a reasonable doubt every essential element
15 of wire fraud concerning a particular count, you shall
16 find the defendant guilty of that count. If the
17 government has failed to meet that burden, you shall
18 find the defendant not guilty of that count. As I also
19 explained, depending on your view of the evidence, you
20 may find the defendant not guilty on all counts, guilty
21 on some counts and not guilty on other counts, or guilty
22 on all counts.

23 So that's the case-specific portion of the
24 instructions I gave you yesterday. Again, it's
25 important to consider this in the context of everything

1 I told you yesterday, but didn't repeat today, and
2 hopefully having told you that again, it will be helpful
3 in your deliberations.

4 All right. You're going to go back, you're going
5 to be given a paper set of the exhibits. In addition,
6 there's some technology back there that hasn't been used
7 before. I'm told it's easy, but I haven't tried it.
8 And a member of the Court's staff, Mr. Niecewicz, is
9 going to come back, he's not going to talk to you at all
10 about the case, he's going to show you what button to
11 push to get the tutorial that will show you how to use
12 the technology, if you want to use it, and then he's
13 going to leave and after he leaves you'll engage in
14 rational discussion with a view to reaching a unanimous
15 verdict on each count.

16 When you reach a unanimous verdict on each count,
17 as I told you yesterday, indicate, you know, the foreman
18 will write that out and give it to the Court Security
19 Officer, and if you have any further questions, you
20 know, write it out, give it to the Court Security
21 Officer, um, and I'll discuss it with the lawyers. But
22 be sure not to indicate, you know, what if anything
23 you've already decided or how you're divided. Okay?

24 The Court will be in recess for the jury.

25 (Jury leaves, 10:50 a.m.)

1 THE COURT: All right. Is there anything
2 further? Just make sure that Mr. Hohler knows where to
3 find you, that you can get here quickly if they have
4 more questions or a verdict.

5 MR. McGINTY: Um, your Honor, in the prior
6 rendition, the Court had mentioned the intent -- that
7 the person intends the "natural consequences." This
8 time the Court has said the person intends the "natural
9 and probable consequences."

10 THE COURT: First of all, one, I believe
11 that's what I said yesterday. I was reading from the
12 same text. Two, I don't think there's any material
13 difference. But the record will reflect what I said
14 yesterday.

15 MR. McGINTY: I mean, I had not seen the
16 Court's instruction before it was rendered and I tried
17 to take careful notes and listen carefully. Um, I -- if
18 the Court had rendered it earlier as "natural and
19 probable consequences," then I would object to the use
20 of the word "probable" in that it would appear to
21 diminish the Court's instruction that the person has to
22 be aware of how the product would be used.

23 THE COURT: Well, I think when we check, for
24 example, the First Circuit jury instructions, you will
25 find "natural and probable" in there and I may be able

1 to find what I told them yesterday.

2 (Pause.)

3 THE COURT: Yeah, what I said yesterday: "You
4 may infer, but you're certainly not required to infer
5 that a person intends the natural and probable
6 consequences." It's here in the draft transcript.

7 MR. McGINTY: Then at that point I did not
8 catch that when the instruction was given and I --

9 THE COURT: Well --

10 MR. McGINTY: I would ask that the record just
11 reflect my objection.

12 THE COURT: All right. I guess I'd say my
13 view is if I did indeed say it yesterday, it's too late
14 to object, and more fundamentally -- because if I made a
15 mistake, and we just caught it now, and I thought it was
16 a mistake and it was possibly material, then I would
17 correct it. But I think this is a correct statement of
18 the law going to the First Circuit.

19 MR. McGINTY: And I would note, your Honor,
20 that I think there's a difference between a person
21 intending the natural consequences of what they
22 ordinarily do, um, but here the Court's saying that the
23 person needs to have knowledge of how a device would be
24 used, and that would appear to diminish that
25 instruction.

1 THE COURT: All right. Let's see.

2 (Reads.)

3 THE COURT: Now, if you look at the First
4 Circuit pattern jury instruction 4.18 dot 1343, it uses
5 the natural and probable language that I used. So, one,
6 I don't think it's --

7 MR. McGINTY: I'm sorry. And that instruction
8 is in what context?

9 THE COURT: Wire fraud. It's in the context
10 that I used it in, I think. (Reads.) Yeah, it's in the
11 context in which I used it.

12 Okay. The Court is in recess.

13 (Recess, 10:00 a.m.)

14 (Verdict, 3:45 p.m.)

15 THE COURT: The parties are present. I have a
16 note which says: "We have reached a verdict. Only one
17 copy has been signed. If you need more than one signed
18 copy, please let us know." One is sufficient.

19 So I will have the jurors in and if they confirm
20 they've reached a unanimous verdict on all counts, I
21 will take the verdict. Okay?

22 (Jury enters, 3:45 p.m.)

23 THE COURT: Mr. Foreperson, I understand from
24 your note that the jury has reached a unanimous verdict
25 on all eight counts, is that correct?

THE FOREPERSON: Correct.

THE COURT: All right. Please hand the verdict form to the Clerk.

(Hands to Clerk, then to judge.)

THE CLERK: The United States of America
versus Ryan Harris, Criminal Matter Number 09-10243,
verdict:

"We, the jury, find the defendant, Ryan Harris, guilty on Count 1, guilty on Count 2, guilty on Count 3, guilty on Count 4, guilty on Count 5, guilty on Count 6, guilty on Count 7, not guilty on Count 8," dated March 1st, 2012, Jury Number 7, Mr." --

THE COURT: That's fine.

THE CLERK: To say you -- so say you, Mr. Foreman, and all members of the jury?

THE JURY: (In unison.) Yes.

THE COURT: Is there anything further before the jury is discharged?

MR. BOOKBINDER: No, your Honor.

MR. McGINTY: There is not.

THE COURT: All right.

Ladies and gentlemen, that concludes your service as jurors in this case. Just as I didn't comment on the evidence or suggest what I thought your verdict should be, I'm not now commenting on the, um, decisions that

1 you've reached, but I do want you to know and fully
2 understand that you've rendered a great contribution to
3 the administration of justice and fulfilled one of the
4 highest obligations and also taken advantage of one of
5 the greatest opportunities provided to citizens in our
6 democracy.

7 The institution of trial by jury is very
8 important. It -- as Thomas Jefferson once said, that if
9 he had to choose between his right to elect the people
10 who make the laws and his right to be tried by a jury of
11 his peers, he would give up his right essentially to
12 vote before he would give up his right to a trial by a
13 jury.

14 The vast majority of criminal cases and the vast
15 majority of civil cases don't go to trial and that
16 nationally they'd be about 5 percent of all criminal
17 cases that go to trial. And it may seem odd -- and the
18 cases that go to trial tend to be the most difficult or
19 the most consequential. And it may seem odd to provide
20 -- you know, to call on amateurs, like jurors, rather
21 than professionals, experienced judges, to make those
22 decisions, which I know are heavy decisions, um, but
23 it's not odd at all, it's an expression of our enduring
24 faith in this country and the common sense and fairness
25 and ability to follow the law of regular people, and you

1 have done that in this case.

2 I haven't yet said "thank you" and I'll tell you
3 why. I think it's odd to thank people for doing
4 something that's in their own enlightened self
5 interest. We've got our tradition of trial by jury from
6 the English, but they've given it up in almost all civil
7 cases and in criminal cases the judges in England at
8 least try, in many instances, to tell the jury what to
9 do, something I try -- I tried successfully not to do in
10 this case, and there's controversy in the United States
11 about whether we should continue to have trial by jury,
12 which I believe in very deeply. It's a valuable thing.
13 And it may have occurred to you, as it always used to
14 occur to me, that you could be in the courtroom on
15 another day, but not as a juror, you, or somebody close
16 to you could be a victim, could be a witness, you could
17 be a defendant, and if that day comes I think you would
18 want what you've given in this case, which is a group of
19 your fellow citizens to take time from their busy and
20 demanding lives to come to court, to listen carefully to
21 the evidence, to understand the law -- and your
22 discriminating verdict indicates to me that you
23 understood the law, and, um, you know, to make an honest
24 judgment. And you've done that. And by coming here for
25 the past week and doing that, you've made it more likely

1 that if you ever have to come again, not as a juror, but
2 as a victim, a witness, or a defendant, that this great
3 institution of trial by jury will be here available to
4 you. So I stop just short of saying "thank you."

5 I have some additional things I have to do --

6 And where's our alternate?

7 MR. MACALEAR: Right here, your Honor.

8 THE COURT: Okay. I thank you very much,
9 too. It's frustrating and difficult not to get to
10 deliberate and decide and, of course, you got the wrong
11 message this morning on the answering machine. But, um,
12 particularly at this time of year when people get sick,
13 um, the weather's bad, it's hard to get through a whole
14 week and not lose a juror. But this is a determined
15 group.

16 I have some matters that I have to discuss with
17 the lawyers, but if I haven't said it, I'm directing the
18 Clerk to enter the verdicts as they've been read. I'm
19 discharging the jury. I'm going to take a very short
20 break and just shake their hand as they go out and then
21 we'll come back to deal with the matters we need to deal
22 with. Okay?

23 Anything before I excuse the jury?

24 MR. BOOKBINDER: No, your Honor.

25 THE COURT: The Court will be in recess for

1 the jury.

2 (Jury leaves, 4:00 p.m.)

3 THE COURT: All right. The case was extremely
4 well presented up to a point. Um, the defendant was
5 certainly energetically and effectively represented.

6 I had taken under advisement the Rule 29 motion.
7 Viewing the evidence in the light most favorable to the
8 government, I had come to the determination that there
9 was sufficient evidence to prove the defendant guilty
10 beyond a reasonable doubt on Counts 1 to 7. The
11 inclination I had was to talk to you about Count 8,
12 which alleged that Madeira accessed the internet from
13 Massachusetts using Harris's products and cloned MAC
14 address and obtained free internet access. And based on
15 what I can recall from the evidence, I didn't think that
16 was proven beyond a reasonable doubt because -- but the
17 jury has found -- that might not have been sufficient to
18 prove it beyond a reasonable doubt as what he got didn't
19 work at first, but they found him not guilty on that
20 charge.

21 So I'm denying the Rule 29 motion with regard to
22 Counts 1 through 7. The defendant may, within 14 days,
23 or by March 15th, file a motion -- well, renew the
24 motion, if he wishes.

25 MR. McGINTY: I do intend to do that, your

1 Honor, to move again for Rule 29 and also for a new
2 trial, under both of those there's a 14-day period. I
3 would ask the Court to consider whether I could file a
4 motion, identifying what the grounds would be, but have
5 a little bit more time to address the issues in greater
6 length. Um, we do intend to vigorously contest the
7 verdict and we have been actively involved in that so
8 far and we do intend to do that, so I would like the
9 opportunity to address this sufficiently to the
10 seriousness of the charge.

11 THE COURT: Well, I think, you know, you
12 should do this, and I haven't looked at this lately, but
13 I don't know that I have the authority to extend the 14
14 days. Um, you need to file something within 14 days,
15 which is a motion and a memo. If you request leave to
16 supplement it, I'll consider it, but I have an interest
17 in deciding this while I can remember it. And I, of
18 course, haven't read the motion, but I looked at the
19 Rule 29 motion that you filed and I raised an issue and
20 I listened very carefully to the closing arguments. But
21 at the moment it seems to me to be -- that the guilty
22 verdicts on Counts 1 to 7 seem to be an application of
23 the conventional law regarding wire fraud, basically
24 linking the objections to the way I instructed to
25 evidence which viewed in the light most favorable to the

1 government was ample to prove the defendant guilty
2 beyond a reasonable doubt. But I'll continue to
3 consider it. But you may not have forever. I know
4 you've got another trial coming up, too, if I remember
5 right, so you should intensively focus on this. And
6 I'll give the government 14 days more to respond,
7 although a faster response would be valuable.

8 But you shouldn't necessarily assume, Mr. McGinty,
9 you know, that you're going to get a second shot and
10 this is going to go out months and months. Do the best
11 you can in 14 days.

12 MR. McGINTY: No, we will take it very
13 seriously.

14 THE COURT: You do. And, you know, I was, um,
15 disturbed that you didn't make your filings in a timely
16 way because there were a lot of issues, but I'll say for
17 the defendant and for the record, and he understands
18 this, you know, that when you got to this, um, you,
19 Ms. Demaso, did a very, very good job. I don't think
20 there's anything you could have done if you worked on my
21 schedule, um, that you didn't do, and the defendant
22 wasn't prejudiced by your missing a deadline.

23 All right. So there's one more issue and that's
24 whether the defendant should be released pending
25 sentencing under Section 3143. If I read this right,

1 we're under Section 3143(a) rather than (b). I guess I
2 need to know what the guideline range may be. And
3 unless it calls for or recommends no time in prison, the
4 defendant would have to be detained unless there's clear
5 and convincing evidence he's not likely to flee or pose
6 a danger to the safety of any person in the community.

7 But what's the government's position with regard
8 to whether Mr. Harris should be released?

9 MR. BOOKBINDER: Your Honor, our position, and
10 I take no pleasure in saying this, is that he should be
11 detained, um, and I'm happy to articulate why that is.
12 First of all, the guideline range, I believe the last
13 time we calculated it, would fall under -- potential
14 enhancements included was, I think -- and I don't have
15 it right in front of me, but it was 71 to 87 months or
16 something along those lines. Certainly all those
17 enhancements the Court may not end up applying, but
18 certainly it's a significant range, um, and for purposes
19 of this inquiry certainly well beyond no time in jail.

20 And the reason for the request is, um, first that
21 the defendant is looking at a significant prison
22 sentence, um, which creates an incentive to flee. Um,
23 but in and of itself that wouldn't be enough, um, for us
24 to be asking for -- um, asking for detention at this
25 point. But as you heard, you know, this is someone who

1 has spent time living, you know, a period of a month or
2 two in Hong Kong, he's married to someone who is a
3 Chinese citizen, although I understand she may have a
4 green card or some immigration status here, but is not a
5 U.S. citizen. He has, um -- this evidence did not come
6 in at trial, but I know the Court heard about it, that
7 he, as Mr. McGinty said this, that he had a bank account
8 in Hong Kong, um, we have evidence that we would have
9 offered at trial that he made at least one \$49,000 wire
10 transfer during the course of this scheme. Um, if I
11 could just ask, I think I could get that answer right
12 now, but during the course of this scheme.

13 THE COURT: But not after he was indicted?

14 MR. BOOKBINDER: Oh, no, no, no, during the
15 scheme and, you know, maybe 2006, 2005 or 2006,
16 something like that, not after he was indicted. Um, so
17 there is some money that's moved over there. And, um,
18 that he has some kind of a property, I think, an
19 apartment or a condo that he owned and, as far as we
20 know, may still own in Hong Kong.

21 THE COURT: You know, I haven't focused on it,
22 but let me ask Mr. Riley, the Pretrial Services officer
23 to come inside the rail. I haven't looked at the
24 Pretrial Services report and I don't believe I have a
25 letter regarding compliance or noncompliance of

1 conditions.

2 MR. RILEY: I apologize, your Honor. Here's
3 the original report. He was interviewed actually by
4 Pretrial Services in the District of Oregon. Here's the
5 bail conditions that were set.

6 (Hands up.)

7 MR. McGINTY: If I may get a copy as well,
8 your Honor?

9 MR. RILEY: I'll see if I have an extra one.

10 THE COURT: Yeah, you know what I'll do? Um,
11 let me hear, you know, a little bit about this generally
12 and then I'll copy -- we'll, in fact, do this now. It
13 does show or say he had a flat in Hong Kong.

14 (Pause.)

15 THE COURT: I'm sorry. Go ahead.

16 MR. BOOKBINDER: So between that, um, you
17 know, having a residence of some kind there, money, um,
18 a bank account over there, you know, a family
19 connection, and to a place that it's worth noting, um,
20 from which it is almost impossible to get somebody back
21 if they're there, um, that raises a real concern of risk
22 of flight and given the presumption at this point and
23 the sentence, at least at the guideline range, um, I
24 would suggest that it, you know, makes sense for him to
25 be detained.

1 THE COURT: Well, as I understand it, the
2 burden, at this point, is on the defendant.

3 Mr. McGinty, would you like to address this?

4 MR. McGINTY: Well, I would like to start with
5 the last comment that Mr. Bookbinder made relative to it
6 almost being impossible to have someone return from Hong
7 Kong. In fact, I have a copy of an agreement with Hong
8 Kong for the surrender of fugitive defendants. This
9 agreement between the United States and Hong Kong was
10 entered into in 1997, um, and it has proven to be an
11 effective means of agreement and cooperation between
12 Hong Kong and the United States. So there is, in fact,
13 a functioning and effective means of returning to the
14 United States people who -- against whom there's process
15 in the United States, just as there is the reciprocal
16 agreement with the United States to commit people to
17 Hong Kong, and that was signed by President Clinton, as
18 I say, back in 1997. So there is a means of returning a
19 person to the United States.

20 Mr. Harris has done the thing that I think is most
21 demonstrative of the single consideration here, which is
22 whether there's a risk of flight, um, he's appeared.
23 And, um, I remember some years ago, um, hearing that
24 Paul Cooley, who was a renowned lawyer, had, um, a
25 client, Miles Connor, and Miles Connor had been charged

1 with homicide, murder 1, and Mr. Cooley had represented
2 him during trial and he was out on \$50,000 cash bail
3 and, um, come verdict his client did not appear because
4 his client knew that that was the moment of judgment and
5 did not appear.

6 Now, in that particular case, um, Mr. Cooley's
7 client proved to be not guilty, but what he had done is
8 he had recognized that appearing as Mr. Harris has done
9 here is the most significant proof of whether he intends
10 to appear at every court appearance -- not just every
11 trial day, which he has done, but coming for the
12 verdict. And he knew full well, I discussed it with him
13 beforehand, I looked through the details of his past to
14 make sure I had sufficient information to present to the
15 Court, but he knew coming in here and he certainly knew,
16 um, when the message from the clerk was that, um, we
17 were not going to find out why we were being called
18 here, um, he certainly knew he was coming here for the
19 verdict. I knew it and he knew it.

20 And we discussed this, um, the issue of what his
21 prospects were for release, um, as I told him to prepare
22 himself should this moment occur, and he appeared, um,
23 and not with a moment's reservation about whether he was
24 going to appear or not because he has respect for this
25 Court, he has demonstrated that by participating in, um,

1 being present for or by phone, a conference with the
2 Court on each time motions were -- required his
3 presence, um, and he's appeared every day at trial, with
4 respect to the Court, demonstrated throughout, by his
5 behavior -- his respect for the Court.

6 So if there's an issue about nonappearance, I
7 think by his behavior -- well, not his behavior, but his
8 presence and the manner in which he's presented himself
9 to the Court each day, particularly his appearance now,
10 um, I would respectfully submit that there is no basis
11 to find, understanding that the burden shifts here, um,
12 to show by clear and convincing evidence that the person
13 is not likely to flee. I think there's ample basis to
14 make that judgment here.

15 THE COURT: And what -- you know, now I've
16 been given, by my secretary, the conditions. I don't
17 know why we all walk in here without the documents,
18 although I've been working in other matters. I
19 interrupted another hearing to take the verdict.

20 What conditions do you suggest? For example, do
21 we have his passport?

22 MR. RILEY: Yes, your Honor.

23 THE COURT: Where is it?

24 MR. RILEY: Pretrial Services in Boston has
25 his passport.

1 THE COURT: You do have his passport?

2 MR. RILEY: Yes, your Honor. He was released
3 back in December of '09 in the District of Oregon on
4 personal recognizance. Um, reporting instructions?
5 He's been reporting to the Eugene Oregon Pretrial
6 Services Office and we've had regular contact, up until
7 even today, with the pretrial officer providing
8 supervision and both the pretrial officer reports that
9 Mr. Harris was very compliant with his conditions of
10 release, not only coming into the office and meeting
11 with him, but also in the field the officer met with
12 Mr. Harris on a regular basis at his home and was able
13 to confirm that he continued to work. Yes, his passport
14 has been -- it was surrendered to the Eugene office and
15 then forwarded to us just recently.

16 MR. McGINTY: And, your Honor, he has been a
17 significant part of the defense effort here, he's been
18 committed to the case, and frankly, um, we intend to be
19 as vigorous as we can to continue to contest the verdict
20 and he's an integral part of that and I think he wants
21 to participate in that and frankly it matters that he be
22 given the opportunity to do that and not in custody.

23 THE COURT: Well, he'd be able to participate
24 whether he was in custody or not in custody.

25 MR. McGINTY: Yes, but we'd --

1 THE COURT: But -- yet this is not over and it
2 would be monumentally stupid for him to flee, or go into
3 exile, um, because that could dramatically increase the
4 sentence he's facing when he's caught and returned.

5 MR. McGINTY: And there are very significant
6 differences between the defense and the government with
7 respect to the guideline range. Um, Mr. Phillips' --
8 Mr. Phillips' guideline range was 8. The government's
9 contention of the guideline range here is 27, um, with
10 significance differences in Mr. Phillips' case, the loss
11 figure was \$5,000 or less. Now, this isn't the time to
12 dispute, either for the government or for me, to dispute
13 whether the government can demonstrate the loss to drive
14 the sentence in the fashion the government suggests
15 here, um, that would be also litigated.

20 (Pause.)

23 MR. McGINTY: It's 7 --

24 MR. BOOKBINDER: It's 2(b)(1.1), your Honor.

25 MR. McGINTY: The base offense level is 7.

1 (Reads.)

2 THE COURT: I'm going to have Mr. -- I'm
3 sorry.

4 Are there any conditions that you would suggest
5 that might increase my -- that might help meet your
6 standard?

7 MR. McGINTY: Well, your Honor, we could do
8 the electronic monitoring would perhaps be sufficient
9 for the Court.

10 THE COURT: And is it his plan or hope to
11 return to Oregon?

12 MR. McGINTY: Yes.

13 THE COURT: And, Mr. Riley, how long would it
14 take to set up electronic monitoring?

15 MR. RILEY: Well, without knowing what
16 Mr. Harris's return travel plans are, um, if he were to
17 arrive tomorrow, which might be difficult, it would be
18 tomorrow, otherwise it most likely would be Monday at
19 the earliest, and so his arrival would be over the
20 weekend. And then the question would be what the
21 electronic monitoring would be, such as on a curfew
22 versus home detention and --

23 THE COURT: All right.

24 What about some financial conditions?

25 (Pause.)

1 THE COURT: Did Mr. Harris travel to Hong Kong
2 from November to January -- November 2009 to January
3 2010? That says it was planned. No? So he didn't go.

4 (Reads.)

5 THE COURT: Well, I don't know what's happened
6 in the last couple of years, but this actually shows
7 Mr. Harris with a net worth of about \$300,000.

8 (Reads.)

9 THE COURT: Let Mr. Hohler give you these
10 documents.

11 (Hands out.)

12 THE COURT: Has Mr. Harris made any tentative
13 plans to return to Oregon?

14 MR. McGINTY: Since we didn't know when the
15 verdict was coming back and the trial would be over, no.

16 (Pause.)

17 MR. McGINTY: Mr. Harris said he believes that
18 he would be able to get a flight back tonight, with his
19 wife.

20 (Pause.)

21 THE COURT: You can consult on this. I mean,
22 I've got take this seriously. The burden is on the
23 defendant. I do appreciate the argument that he hasn't
24 fled to date. There is a change in circumstances and
25 it's recognized in the law that it would be very stupid

1 of him to flee, but people have been known to do stupid
2 things.

3 Do you wish to testify or say anything that might
4 provide me some information on what he intends to do if
5 I release him?

6 MR. McGINTY: Well, your Honor, frankly I'm
7 loathe to do that. I would recommend to you, um -- I
8 think what the Court ought to consider, um, is
9 Mr. Harris is married to his wife, Carly Chan. They got
10 married back in January of 2006. They are deeply
11 committed to one another. She's a legal permanent
12 resident in the United States. They've been living
13 together. Um, they have a place in Hong Kong purchased
14 by her father. They had regularly visited Hong Kong in
15 order to visit with her parents. Um, they have a bank
16 account there for purposes of living there to visit her
17 parents, um, but their residence, um, their -- the place
18 that they view as their home is in Redmond, Oregon.

19 The figures, the money that is set out in the
20 financial resources -- um, and this is one of the
21 hazards of filling this out the way these are done. The
22 person's arrested, they come in, and they're basically
23 asked to fill out a financial record. Each of these are
24 projections based on property values that have largely
25 evaporated. So the Portland property is not worth that

1 256, in fact, it's got a negative asset value, um, and
2 the same is true of the place that her parents purchased
3 in Hong Kong, but that's her parent's property on the
4 deed, they pay a mortgage on that, they make a payment
5 on that, and they do anticipate that that's going to be
6 a gift.

7 THE COURT: Well, I guess I don't have any
8 current financial information because I'm thinking of
9 requiring a bond if I release him.

10 MR. McGINTY: Okay. Um, would it be an
11 unsecured bond?

12 THE COURT: No.

13 MR. McGINTY: Because he would be unable to
14 post cash --

15 THE COURT: Well, "unsecured"? I don't know
16 if we're talking in the same language. He'd have to
17 acquire a bond.

18 MR. McGINTY: But he would sign a bond and as
19 long as there's no -- that he doesn't have to post
20 money, he would be prepared to do that, sir.

21 THE COURT: What's the value of an unsecured
22 bond? I mean, you just told me he has no assets. How
23 would that discourage him from fleeing.

24 MR. McGINTY: Because he's 26 years old and he
25 plans on, you know -- and his financial future matters

1 to him and that's --

2 THE COURT: What's that?

3 MR. McGINTY: His financial future matters to
4 him and that's a commitment from the Court.

5 THE COURT: Mr. Bookbinder, what do you say?

6 MR. BOOKBINDER: Your Honor, I certainly
7 understand what defense counsel is saying and I
8 understand why this is difficult, but, um, you know,
9 this is someone -- and again the presumption is the
10 other way now, it's someone who is facing a significant
11 sentence and obviously they'll need litigation about the
12 guideline range here. But, you know, the gain to him
13 alone is a significant amount of money and there are
14 enhancements that are very likely to apply.

15 And, you know, he's got an -- he's got an
16 apartment in Hong Kong, he's got family in Hong Kong,
17 he's got a bank account in Hong Kong, there may have
18 been -- I don't know -- I have no personal experience
19 with extradition matters from Hong Kong, but obviously a
20 lot has changed with China since -- well, a lot has
21 changed with Hong Kong since it became part of China.
22 So, um, you know, I think there's a real basis to be
23 concerned here.

24 THE COURT: I know, but if the government
25 represents that it's hard to get somebody back from Hong

1 Kong, you ought to know whether we have an extradition
2 treaty in matters like that.

3 I'm going to do the following. I'm not persuaded,
4 at the moment, that there are conditions that reasonably
5 assure Mr. Harris -- I'm not persuaded by clear and
6 convincing evidence that essentially releasing him
7 without conditions is prudent. I'm going to require
8 that he be detained. By that's without prejudice to
9 considering this further. Once I know what his proposed
10 flight information is and once I know when the
11 electronic monitoring can be set up, once I have a
12 proposal on the bond and any other information, um, I'll
13 address this again.

14 But at the moment I don't find there's clear and
15 convincing evidence that persuades me that just
16 releasing Mr. Harris, who is convicted of fraud, of
17 course, like everything else in the case, I'm going to
18 carefully consider the Rule 29 motion or the motion --
19 the renewed motion for acquittal and for a new trial.
20 But at the moment I see this case as involving a
21 conventional application of the wire fraud statute to,
22 um, you know, to facts that fit well within them.

23 MR. McGINTY: Can I?

24 THE COURT: No, no, why don't you -- here,
25 stop. I mean, I'll listen to you. But, you know, if

1 you get me something, um, tomorrow, you know, we may
2 revisit this on Monday, but I want to know what the
3 proposed conditions are and whether they're feasible.

4 MR. McGINTY: If I might, your Honor? As I
5 mentioned before, I'm loathe to have a client who's been
6 on trial here --

7 THE COURT: And I know. And, you know, it was
8 very reasonable for you to take that position, and I
9 probably -- but you took a position, I now have all the
10 information I'm going to have today, and I'm not
11 persuaded by clear and convincing evidence that
12 releasing Mr. Harris -- you know, that if Mr. Harris is
13 released on no conditions, um, that he is not likely to
14 flee.

15 MR. McGINTY: Well, your Honor --

16 THE COURT: He's convicted of fraud. So
17 that's it. I ruled. I ruled.

18 MR. McGINTY: Might I say one thing?

19 THE COURT: Yes.

20 MR. McGINTY: Mr. Harris wanted to speak and I
21 prevented him from doing that and I did that, using my
22 judgment, he wished for that opportunity and I -- I -- I
23 would ask that the Court consider that.

24 THE COURT: You mean now he wants to say
25 something?

1 MR. McGINTY: Well, he wanted to -- as the
2 Court --

3 THE COURT: Well, let me ask you this. Here.
4 Go ahead. You tell him what your concerns are and then
5 he'd tell me if he would like to say something, and I
6 may or may not listen to it if he wants to say something
7 after you explained your concerns.

8 MR. McGINTY: Okay.

9 (Pause.)

10 MR. McGINTY: Mr. Harris does wish to address
11 the Court.

12 THE COURT: It may be subject to cross-
13 examination. Here, approach the witness stand. Well,
14 look, let me make sure we understand this.

15 Does the government -- he can speak, but does the
16 government want to cross-examine him?

17 MR. BOOKBINDER: Your Honor, it all depends.

18 THE COURT: On what he says.

19 MR. BOOKBINDER: If he's making factual
20 statements that I think are inappropriate, then I would
21 ask for that, but if not, then not necessarily.

22 MR. McGINTY: Your Honor --

23 THE COURT: What? Go ahead.

24 MR. McGINTY: I don't know what the boundaries
25 are that are being set here.

THE COURT: If I'm conducting, in effect, a detention hearing, when a defendant wants to submit evidence in a detention hearing, he goes on the witness stand, he takes an oath, and he's sworn. He's answers questions and he's subject to cross-examination.

MR. McGINTY: May I have a moment?

THE COURT: Yes.

(Pause.)

9 MR. McGINTY: Your Honor, under the
10 circumstances I have to withdraw the request. I -- my
11 concern is this. On the suggestion or the approach the
12 Court had set out, um, Mr. Harris needs to, as I
13 understand this, he need to set or to report to the
14 Court what his flight plans would be, he's the person
15 that would make those flight plans. I can't. If I come
16 back tomorrow and say that he's prepared to make flight
17 plans, um, I'm not in a position to make them, nor would
18 he, from a place of custody.

19 THE COURT: Well, presumably his wife could.
20 I need to know -- and this is -- I'm not punishing him
21 for not saying anything, but I'm trying to be fair to
22 both sides and, you know, we're in a detention
23 proceeding posture, not a sentencing, and when I get to
24 sentencing, you know, he'll get a chance to speak and,
25 like everything, I'll take it seriously and I've

1 observed him and he has been respectful and he's been on
2 the line when he was supposed to be here, to be on the
3 line, and he's been here when he's supposed to be here,
4 and I have that in mind. But I also have in mind that
5 now he's convicted of fraud, um, which is, you know,
6 fundamentally a crime of dishonesty, and he doesn't live
7 in Massachusetts, he has no roots here, he's going to
8 get on an airplane and go somewhere, and there can't be
9 any immediate electronic monitoring and there doesn't
10 seem to be any security that can be hosted. And so, you
11 know, at least until I know that arrangements are in
12 place to get him home, to get the electronic monitoring,
13 then I'll decide it, that I'm satisfied that he's going
14 to go home.

15 MR. McGINTY: May I have a moment, your
16 Honor?

17 THE COURT: Well --

18 MR. McGINTY: The Court has been very patient.

19 THE COURT: Yeah, I know. I know it's
20 consequential, but, um, you know, every time you lose
21 you want to change, you know, your position, get another
22 bite at the apple, and I'm going to let you do it.

23 Because, Mr. Harris, you know, when Mr. McGinty's
24 cautioning you or telling you about the risks of
25 testifying, you know, he's basing it on experience, and,

1 on the other hand, I don't have to decide whether he's
2 going to -- is likely to flee, I have to decide whether
3 you're likely to flee, and I just have limited
4 information. So you're under no obligation to testify.
5 But I think if there's something I'm going to rely on
6 and, of course, you know, you're seeing that my own
7 thinking has evolved and that it's not sufficient to
8 just let him say something, that if the government wants
9 to cross-examine him on it, then I think fairness
10 requires that I let them cross-examine him. So you can
11 talk to him.

12 (Pause.)

13 MR. McGINTY: Your Honor, Mr. Harris's wife is
14 here and she is, um, without a driver's license. They
15 have a rental car which they need to return, they're
16 unable to do that. She is, um, because of her limited
17 English skills, um, she has relied upon Mr. Harris to
18 make the plane arrangements and do the sorts of things
19 that would make possible her return trip, and she has
20 relied on her husband to help her get here and is
21 relying on him to get her back.

22 They -- I would simply, given the gravity of a
23 commitment order and the fact that I will, in several
24 days, have likely no more information I can offer the
25 Court than now, um, the only thing I might suggest is

1 that, um, Mr. Harris might be interviewed by Pretrial
2 Services which might supplement and make more recent the
3 information that's on the Pretrial Services report. But
4 I don't know that in two days I'm going to have the kind
5 of arrangements that he would be able to make, which I
6 can't, and the kind of assurances that the Court will
7 look for that, um, I would have a means to provide him.
8 So my concern is that, um, as much as I'm imposing upon
9 the Court now by prolonging this, I won't have a second
10 chance to effectively communicate with him and I don't
11 want that to happen.

12 THE COURT: Does Mr. Harris want to testify
13 and possibly be subject to cross-examination or not?

14 MR. McGINTY: No, I'm sorry, I already
15 indicated that I was withdrawing that request.

16 THE COURT: I thought that's what you were
17 going to talk to him about, but what I observed is you
18 were talking to the women behind you.

19 MR. McGINTY: I was. I was talking to the
20 investigator in my office to find out what the
21 circumstances involving his wife were and what the
22 hardship it would impose on her.

23 A moment, your Honor?

24 (Pause..)

25 MR. McGINTY: I would -- I just ask the Court

1 to consider having a Pretrial Services interview to
2 supplement the information.

3 THE COURT: I'm not. I've got to make an
4 assessment of Mr. Harris.

5 Here's the final chance. This is the last
6 chance. If he wants to say something to me, he can, and
7 if the government wants to cross-examine, I'll consider
8 whether fairness requires it and I may. Um, but -- no,
9 that's it. You can talk to him once more, otherwise I'm
10 going to make a decision based on the information I have
11 now.

12 Basically what I want to know is essentially why I
13 should believe or be convinced that he's not going to
14 flee now that he's been convicted, and you sound great
15 but I'm not making a prediction of how you're going to
16 behave, I have to make a prediction about how he's going
17 to behave.

18 MR. McGINTY: Well, he would like the
19 opportunity to convey to the Court his intention of
20 continuing to, um, honor the appearance requirements and
21 to show up here.

22 THE COURT: All right. And he may have to
23 answer some questions about it and we'll listen to it.
24 But he's going to stand and do it under oath.

25 Administer the oath.

1 (THE DEFENDANT, sworn.)

2 THE COURT: All right. Well, actually, why
3 don't you stay standing.

4 All right. Mr. Harris, the question essentially
5 is, you know, why should I believe that if I let you
6 walk out of here today, you know, you'll go back to
7 Oregon as promptly as possible, you'll stay in your
8 apartment or your home until the electronic monitoring
9 is set up and then stay there until your sentence,
10 except for medical emergencies or religious reasons,
11 things like that?

12 THE DEFENDANT: Your Honor, um, I've had
13 against me a guideline of up to 25 years in prison and
14 even knowing that, um, I reported to a Mr. Gennari from
15 Pretrial Services in Eugene, Oregon, um, on a weekly
16 basis. Um, I met with them -- firstly, he visited my
17 house, um, once or twice every single month. Um, I'm
18 actually currently employed with a company in California
19 where I actually worked from home. Um --

20 THE COURT: What do you do?

21 THE DEFENDANT: Um, I write software for them,
22 um, and over 40 hours every single week, um, to make my
23 mortgage payment that I am under water in. Um, but, you
24 know, that's what I do.

25 And my wife, um, she -- she can't rely on -- I

1 have to do almost everything for her. Her English
2 capabilities is very, very low. Um, she -- it would be
3 really hard for her even to travel back now, um, you
4 know, to our home.

5 And, like I said, I mean, and you can ask Pretrial
6 Services, I have been, you know, over three years in
7 constant contact with them on everything. And I have no
8 issues about tonight. I will see Nick Gennari
9 tomorrow. I will drive to Eugene. I will be at his
10 office as soon as I can.

11 THE COURT: Here, let me ask you this. What's
12 the name of the company you work for?

13 THE DEFENDANT: It's called Cable Site. It's
14 located in Alta Vista, California.

15 THE COURT: And what kind of software products
16 do you develop?

17 THE DEFENDANT: Um, it's mostly for server
18 infrastructures.

19 THE COURT: Is this a real legitimate company
20 that --

21 THE DEFENDANT: I've actually been providing
22 my pay records to Nick Gennari every month, um, with
23 every single pay stub that they pay me, and they pay me
24 on a weekly basis.

25 THE COURT: And this is not a company that

1 makes modified modems or anything like that?

2 THE DEFENDANT: No. No. No, your Honor.

3 No. I mean, they have -- I'm sorry. Um, no, your
4 Honor, they don't -- they actually only do the server
5 end of it.

6 THE COURT: And do you understand that I'm
7 considering releasing you requiring you to post at least
8 an unsecured bond, say, you know, if you fled or failed
9 to appear, you know, \$250,000, and putting you on
10 electronic monitoring so that while you could stay home
11 with your wife, you couldn't go out and play.

12 THE DEFENDANT: Your Honor, you can make it
13 half a million dollars, I will show up to court every
14 single time I'm required. I mean, the first time I had
15 a court appearance it was one or two weeks after my
16 initial appearance in Eugene and, you know, I raised my
17 own travel over here, um, you know, I was here promptly,
18 and every single time I've been asked, I have, you know,
19 gone out of my way to make sure that I'm here on time,
20 that I'd show up, and not evade the Court order.

21 THE COURT: Does the government think there's
22 anything else I should ask the defendant?

23 MR. BOOKBINDER: Your Honor, I suppose, um,
24 you know, to the extent that there's information in the
25 presentence report that's several years old and it's

1 worth knowing --

2 THE COURT: You mean the Pretrial Services
3 report.

4 MR. BOOKBINDER: I'm sorry, the Pretrial
5 Services report -- whether he -- I mean, it sounds like
6 he still has the apartment in Hong Kong and a bank
7 account there, but I suppose we could --

8 THE COURT: Is there still an apartment in
9 Hong Kong?

10 THE DEFENDANT: There is, your Honor.

11 THE COURT: And who owns that?

12 THE DEFENDANT: It's actually in her father's
13 name, and I'm not sure how the laws work there, but it
14 has her on it, I believe, as well as me, and he -- and,
15 of course, it's owed to the bank or to the financial
16 agencies, just like my house here in Oregon.

17 THE COURT: And why should I think you're not
18 going to go to Hong Kong?

19 THE DEFENDANT: Well, first off, I don't think
20 there's an airline in the world that lets you board
21 without a passport. Um, I think there would actually be
22 no physical way for me to get there except to swim, and
23 I'm not a very good swimmer.

24 THE COURT: Does your wife still have her
25 passport?

THE DEFENDANT: She does, your Honor.

THE COURT: Mr. McGinty, do you want to see if she's willing to surrender her passport?

THE DEFENDANT: She does, your Honor.

THE COURT: You can ask her or tell her.

(Pause.)

MR. McGINTY: Yes, your Honor.

THE COURT: All right.

MR. McGINTY: It's in the car, um, near here, so she could produce it very quickly.

THE COURT: Yeah, I think that would give me some -- yeah, provide the passport to Pretrial Services.

Does she have other identification other than the passport that would permit her to get on the plane?

THE DEFENDANT: Just her green card, your Honor.

(Pause.)

THE DEFENDANT: And her permanent resident card that she got from Homeland Security has a card.

THE COURT: But does it have her picture on it?

THE DEFENDANT: Yes, it does. I believe she can use that card to fly.

MR. MCGINTY: She does have it. She has a

1 permanent resident card that I can show to the Court.

2 THE COURT: Okay. I mean, I want to make sure
3 she can get on the plane.

4 (Shows to judge.)

5 THE COURT: Here, I mean, the relevance of
6 this to me is theoretically or conceivably Mr. Harris,
7 who is now convicted of fraud, could have gotten another
8 passport in the last couple of years, but I don't know
9 that he would have had an incentive to get one for his
10 wife, and I've watched her weeping here today and I do
11 have the sense that he's not going to leave her and that
12 she can't go anywhere, so she's going to stay in the
13 United States.

14 All right. Here's what I'm doing. Mr. Harris is
15 to remain in the custody of the marshals until
16 Mrs. Harris's passport is surrendered to Pretrial
17 Services. Mr. and Mrs. Harris are to arrange to get
18 back to go -- I'm ordering that Mr. Harris is to go, as
19 soon as he can, from Massachusetts to Oregon, to go
20 home, with no unnecessary stops in between. Mr. Harris
21 is to stay home until electronic monitoring can be set
22 up. He's to be on electronic monitoring initially at
23 least 24 hours, but he can go out for religious
24 services, he can go out if he has a medical appointment
25 or with the approval of the probation officer, or he can

1 go out if there's a medical emergency. But, you know,
2 once that's up and -- and I'm ordering that if you use a
3 computer, you use it only for lawful purposes.

4 You know, you're a young man and you've got
5 yourself in a lot of trouble. I don't know what's going
6 to happen in your sentence. I always keep an open
7 mind. But it's going to be a lot worse for you if you
8 flee or try to flee.

9 Do you understand that?

10 THE DEFENDANT: Yes, I do, your Honor.

11 THE COURT: All right. So I -- you know, I
12 have to make a judgment. So I'm ordering a \$250,000
13 unsecured bond, initially at least 24 hour electronic
14 monitoring, and use of the computer only for legitimate
15 purposes. That the government -- that Pretrial Services
16 will hold Mrs. Harris's passport until he's sentenced
17 and if he's sentenced to prison and allowed to self
18 report, until he self reports. And there'll be other
19 standard conditions that I'll impose once I get a form.

20 All right. Mr. Harris, it's -- it's possible to
21 be intelligent and not wise. I think the scheme at
22 which you've been convicted required intelligence and
23 skill and hard work, but it reflects a lack of wisdom,
24 and this is a close question, and I haven't relaxed of
25 the standard, but I'm basically depending on what you've

1 told me. But one way or the other you're going to see
2 me again. So it would be unwise for you to disappoint
3 me.

4 Do you understand?

5 THE DEFENDANT: Yes, your Honor, I won't
6 disappoint you.

7 THE COURT: Thank you.

8 All right.

9 MR. McGINTY: Just so the marshal knows, the
10 -- once the passport is given over, as I understand it,
11 the marshals would then --

12 THE COURT: No, I'll have Mr. Hohler --
13 Mr. Riley will tell me when he's got the passport, we'll
14 prepare some --

15 And he's going to have to sign some paperwork?

16 PRETRIAL OFFICER: Yes, your Honor. He'll be
17 signing an order acknowledging the conditions.

18 THE COURT: Yeah, when the paperwork's done,
19 he'll be able to leave.

20 You know, you saved him at least a weekend in
21 jail, but he's going downstairs while I finish the
22 hearing I interrupted about an hour and a half ago, and
23 we button this up. All right?

24 MR. BOOKBINDER: Will the Court want the
25 parties back here for --

1 THE COURT: No, actually here, let me tell you
2 the -- here, Mr. McGinty, listen to this. I have to
3 schedule the sentencing.

4 My intention is to schedule the sentencing for May
5 23 at 3:00 p.m. If there's anything other than the
6 information in the presentence report, it shall be filed
7 no later than May 9th, um, so that's sentencing memos,
8 letters, motions, and any reply shall be filed by May
9 16. But, you know, actually -- actually --

10 (Pause.)

11 THE COURT: All right. It's possible that
12 that may slip a few days further back. But at the
13 moment --

14 (Pause.)

15 THE COURT: All right. I think the 23rd
16 should be all right. All right?

17 So, Mr. Harris, you'll go with the marshals and I
18 hope in about an hour we'll be able to get you out of
19 here.

20 All right. Anything else -- excuse me. He's not
21 going to go right this second. The marshals will wait
22 just a minute.

23 Is there anything else before we recess?

24 MR. McGINTY: There is not, your Honor.

25 THE COURT: All right. The Court is in

1 recess.

2 (Ends, 5:00 p.m.)

3

4 C E R T I F I C A T E

5

6 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do
7 hereby certify that the forgoing transcript of the
8 record is a true and accurate transcription of my
9 stenographic notes, before Chief Judge Mark L. Wolf, on
10 Thursday, March 1, 2012, to the best of my skill and
11 ability.

12

13

14 /s/ Richard H. Romanow 11-07-12

15 RICHARD H. ROMANOW Date

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